IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 476

BENJAMIN BRAUNSTEIN and DIANA BRAUNSTEIN; Estate of Benjamin Neisloss, Deceased, JULIA NEISLOSS and RUSSELL NEISLOSS, Executors, and JULIA NEISLOSS; HARRY NEISLOSS and LILLIAN NEISLOSS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

REPLY TO BRIEF FOR THE RESPONDENT

THURMAN ARNOLD
LOUIS EISENSTEIN
JULIUS M. GREISMAN
Arnold, Fortas & Porter
1229 19th Street, N. W.
Washington 6, D. C.
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 476

BENJAMIN BRAUNSTEIN and DIANA BRAUNSTEIN; Estate of Benjamin Neisloss, Deceased, JULIA NEISLOSS and RUSSELL NEISLOSS, Executors, and JULIA NEISLOSS; HARRY NEISLOSS and LILLIAN NEISLOSS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

REPLY TO BRIEF FOR THE RESPONDENT

The petition for certiorari rests on two grounds for granting the writ. The respondent agrees that the petition should be granted with respect to the first ground.

The respondent opposes the grant with respect to the second ground because it allegedly presents a mere question of fact. However, no such question is involved here. The Second Circuit expressly recognized, as did Judge Kern who heard the testimony, that the evidentiary facts are not in dispute. (Pet. 12.) The issue,

rather, is whether the court below applied the correct standard of judgment. Such a question is clearly a question of law. See *Powers* v. *Commissioner*, 312 U.S. 259, 260 (1941). In the words of this Court, "There is no significant dispute as to the basic facts pertinent to the decision. We are thus not confronted here with the provision of Fed. Rules Civ. Proc. 52(a), that findings of fact shall not be set aside unless clearly erroneous." *United States* v. *du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957). See also *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961).

The taxpayers contend that the court below arbitrarily applied objective tests of liability instead of the subjective standard fixed by Congress. While the court purported to apply a subjective standard, the stated reasons for its conclusion have little to do with that standard. A decision which rests on irrelevant considerations is necessarily erroneous as a matter of law. See *Dickinson* v. *United States*, 346 U. S. 389, 395-397 (1953). And, as we have noted, the problem raised by the error here extends well beyond the present case. (Pet. 18.)

The respondent's request for a limited grant of certiorari would artificially isolate what are interrelated issues of statutory construction. Under section 117(m) a corporation is collapsible only if it was used for the construction of property "with a view to" the realization of a capital gain attributable to the property. In *United States* v. *Ivey*, 294 F. 2d 799 (1961), *rehearing denied*, 303 F. 2d 109 (1962), the Fifth Circuit has held that the statute applies only to a gain which would have been realized as ordinary income if the enterprise had been individually owned. Unless a

corporation was used in order to convert such ordinary income into capital gain, it follows that the stockholders lacked the requisite "view" or purpose proscribed by the statute.* The "view" and the contemplated gain, then, are integral elements of one over-all rule of law created by the statute. Moreover, the two grounds on which the petition rests involve common considerations. For example, the same undisputed facts which establish that the taxpayers held rental properties as long-term investments (Pet. 2-3) also indicate that Oakland Gardens was similarly built with the same purpose. Indeed, the respondent evidently concedes that the taxpayers "would have been entitled to capital-gains treatment had they conducted the enterprise in their individual capacities without utilizing a corporation." (Resp. 2.)

In short, to divorce one question from the other is to fragmentize the unified scheme of the statute and the disposition of intertwined issues.

Respectfully submitted,

THURMAN ARNOLD
LOUIS EISENSTEIN
JULIUS M. GREISMAN
Arnold, Fortas & Porter
1229 19th Street, N. W.
Washington 6, D. C.
Attorneys for Petitioners

---

* According to the respondent, the taxpayers are arguing "that Section 117(m)'s prescription of ordinary-income treatment is inapplicable here even if the corporation was, as the courts below found, 'collapsible.'" (Resp. 3.) This is not a correct statement of the taxpayers' position. They contend that a corporation is *not* collapsible, and hence Section 117(m) does not prescribe "ordinary income treatment," unless the realized profit constitutes ordinary income converted into capital gain.